Supreme Court, U.S.
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No. 02-964

IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF INDIANA, NEBRASKA, TEXAS, OHIO, WEST VIRGINIA, ALABAMA, UTAH, SOUTH DAKOTA, WYOMING, DELAWARE, PENNSYLVANIA, NORTH DAKOTA, OKLAHOMA, MONTANA, COLORADO, MAINE, WASHINGTON, CALIFORNIA, NEVADA and VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

By statute and the Court's case law, a state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. The Court has held that exhaustion requires a state prisoner to fairly present his claim to the state's highest court and that fair presentment requires the prisoner to have alerted the state court that the claim is a federal one.

Does a state prisoner "alert" the State's highest court that he is raising a federal claim when—in that court—he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim is federal in nature?

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INTERESTS OF THE AMICI

The *Amici Curiae* states devote considerable resources to defending state court judgments in federal habeas corpus actions. Most federal habeas petitions present questions of exhaustion of state court remedies and procedural default for failure to fairly present federal questions in state courts. 6 Wayne R. LaFave *et al.*, *Criminal Procedure* § 28.5(a) (2d ed.) (2003 Pocket Part) (citing a 1995 Department of Justice study). This case presents the important question of what quality of presentment is necessary to exhaust an issue in state court. The resolution of this question will affect the *Amici* states' interests in the fair and efficient resolution of federal habeas proceedings, the protection of state court judgments, and the efficient and effective use of state government resources.

SUMMARY OF THE ARGUMENT

I. Oregon's proposal properly respects state court procedural rules that are designed to facilitate appellate review. The Ninth Circuit's test violates the respect due to state court procedures by ignoring the rules that bind state appellate courts' consideration of claims. Consequently, federal habeas courts allow state prisoners to litigate federal claims that were not properly before the state appellate courts. Such a test flies in the face of the comity concerns long respected by the Court.

II. Oregon's proposal accounts for the fact that many claims have dual bases in both federal and state law. An express facial presentment rule, such as Oregon suggests, respects distinct state law claims that are analogous to, but methodologically different from, federal claims. Many states grant protections to defendants that are greater than, or different from, similar federal protections. Those states require defendants to differentiate federal claims from analogous state law claims that defendants wish the state court to resolve. Without an explicit, facial exhaustion test, federal habeas courts increasingly fail to respect the

analogous state law grounds that state courts identify and resolve.

III. An explicit facial presentation rule addresses the substantial interest of the Amici states in conserving the limited resources available to state government attorneys. Without Oregon's proposed test, state government appellate attorneys are forced to comb the record to identify and counter potential federal claims to help preserve state courts' ultimate dispositions. If the Court adopts Oregon's test, state government attorneys who defend state court judgments in federal habeas court will dedicate less of their time to litigating exhaustion and fair presentment questions and instead focus their valuable and limited resources on the merits of claims. State prisoners and federal habeas courts will similarly benefit from such a rule.

ARGUMENT

I. Permitting federal claims to spring forth in federal habeas proceedings without prior express presentation to state courts undermines state court procedural rules.

Federal courts must respect the role that state court procedural rules play in the criminal justice system. Those rules facilitate review, not hinder it. *Reed v. Ross*, 468 U.S. 1, 10 (1984) (state court procedural rules facilitate the complex criminal justice system and channel the resolution of claims in a fair and efficient manner). So too should the rules governing exhaustion and fair presentment in federal habeas cases. If the exhaustion and fair presentment requirements did not respect state court procedural rules, the federal habeas apparatus would undermine the ability of state courts to control their own proceedings. *Id.* at 11. "[I]n some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Id.* (quoting *Francis v. Henderson*, 425 U.S. 536, 539 (1976)). Indeed, the Court has long recognized the valid role that state

court procedural rules play in fair presentment. *Coleman v. Thompson*, 489 U.S. 346, 349-51 (1991) (failure to comply with state court procedural rules results in procedural default in federal habeas); *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (exhaustion not satisfied by presenting a claim to a state appellate court in a procedural context where the merits cannot normally be considered); s*ee also Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam) (a state court cannot be faulted by federal courts for constraining its analysis of a claim to state law when no federal claim was raised).

The Ninth Circuit's "fair opportunity" test, which allows for exhaustion of state remedies where a federal basis for a claim is not asserted to the state appellate courts so long as the prisoner alleged sufficient facts to the appellate court and the trial court addressed the federal issue below, fails to accord the proper respect to state court procedures. The purpose of exhaustion and fair presentment is to respect the state courts and their judgments, not to facilitate easier access to federal habeas review. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Ex parte Royall*, 117 U.S. 241, 251-52 (1886). "Fair" presentment necessarily implies that prisoners have a duty to comply with state court procedural rules so the state courts can address the merits of the prisoners' claims. Comity places a similar burden on federal courts: state court procedural rules must be respected. *Coleman*, 489 U.S. at 351. When federal courts disrespect those rules they cause "significant harm" to the States. *Id.* at 349.

The "fair opportunity" test used by the Ninth Circuit looks not at what the habeas petitioner actually argued to the state courts, but rather focuses on whether a state court could have fashioned a federal claim if they willed it. Such a policy presents a "Catch-22" for state courts. Most, if not all, state courts are limited to considering only those issues presented by the parties. State courts are constrained by their state's law. That is exactly what the Oregon Court of Appeals did in this case.

Yet if the Ninth Circuit's "fair opportunity" test is adopted by the Court, state court procedural rules will be disrespected by federal habeas courts. State courts will be forced to ignore their own facial presentation rules in the interest of satisfying the expectations of federal habeas courts. It would be irrelevant whether a prisoner specifically and facially asserted federal claims in her state appellate briefs so long as the prisoner gave the state appellate courts an "opportunity" to address a federal claim addressed by the trial court. State courts will be forced to choose between their own procedural law and the will of the federal courts. A state court will violate its own law should it sift the record for any potential federal claims in an effort to ensure proper respect is accorded to its judgment. But should a state court abide by its duty to follow the law, federal courts will accord little respect to the state court's judgment. Either situation flies in the face of the purpose of exhaustion and the principles of comity that federal courts have traditionally accorded their state counterparts.

Moreover, the Ninth Circuit's rule is self-defeating. There is no need for a full and fair presentment requirement if the question becomes not what the prisoner actually presented on appeal but rather what a state appellate court might have decided to address but for its own procedural rules. Exhaustion would become a mere formality—a "perfunctory jaunt" through the state court system. *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994). The so-called "fair opportunity" test accords no respect to state court procedural rules and undermines the premise of exhaustion and fair presentment altogether.

Oregon's proposed explicit facial presentation test respects the state courts' responsibility to follow their procedural rules consistently while balancing the interests of the state prisoner and the federal courts. The Court has previously suggested that fair presentment requires an explicit assertion of a federal right in state court. *See Duncan*, 513 U.S. at 366 ("If a habeas petitioner wishes to claim that an

evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) ("It is not enough that all the facts necessary to support the federal claim were before the state courts . . . or that a somewhat similar state-law claim was made.") (internal citations omitted). But the majority of circuits employ tests that focus on whether a state court reasonably could have viewed a prisoner's claim as having a federal law basis. *See* Petition for Writ of Certiorari at 18-21 (surveying the seven circuits who still employ "whole record review" and "substance of the claim" tests post-*Duncan*).[1] Such a focus misses the point. Oregon's proposed test is entirely consistent with the comity concerns of exhaustion because both properly place the burden of clearly articulating a claim on the state prisoner and not on the courts. The states' legitimate and significant interests in controlling their courts, ensuring constitutionally fair proceedings, and receiving respect for their judgments are accomplished best through Oregon's approach.

II. Explicit facial denomination of federal claims respects the independent and important development of state constitutional law and prevents the waste of valuable and limited judicial resources of the states.

Eclipsed by the federal constitution for decades, state constitutional law now occupies a vital place in our federal scheme. This essential role of state constitutional law is threatened unless explicit denomination of federal claims is required by the fair presentment element of exhaustion under 28 U.S.C. § 2254(b)(1)(A).

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[1] As explained in Oregon's petition, the Ninth Circuit's "fair opportunity" test used in this case is a variety of the "whole record review" test. The "substance of the claim" test uses the four considerations explained in *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc).

The emergence of state constitutional rights doctrine accelerated in the 1970's. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977). The number of state constitutional rights doctrines that are distinct from their federal counterparts continues to increase. David Schuman, *A Failed Critique of State Constitutionalism*, 91 Mich. L. Rev. 274, 276 (1992). When a state court interprets a provision of its state constitution, that court is free to expand the interests created by the parallel federal provision and to adopt a separate methodology for analyzing those claims. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982). State constitutional provisions that are textually distinct from their federal analog may signal a different intent on the part of the state framers, thereby necessitating an independent interpretation. James W. Talbot, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 Wash. L. Rev. 1099, 1103 (1991). Even with virtually identical language, a state may adopt an interpretation and mode of analysis different from its federal counterpart. *See, e.g., State v. Kaluna*, 520 P.2d 51, 58-59 (Haw. 1974) (holding that the circumstances surrounding an arrest must justify searches incident to arrest); *Collins v. Day*, 644 N.E.2d 72, 74-75 (Ind. 1994) (adopting a methodology for state privileges and immunities claims that is distinct from the federal equal protection standard).

Encouraging this growth is important, because states constitute an important laboratory for constitutional law. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *State v. Caraher*, 293 Or. 741, 749, 653 P.2d 942, 951 n.13 (1982) (observing that the Bill of Rights was based upon corresponding provisions of the first state constitutions). The Court has supported the development of state constitutional law in part by respecting a state court's disposition of issues on state constitutional law grounds. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11-12 (1987); *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983).

States have also revitalized their constitutions by adopting a principle of resolving cases on state constitutional grounds exclusively and relying upon the federal constitution only when the former proves insufficient to dispose of the claim. *See, e.g., Large v. Superior Court,* 714 P.2d 399, 405 (Ariz. 1986). State courts often resolve claims exclusively on state constitutional law grounds when both federal and state constitutional issues are present. Ronald K. L. Collins, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 Hastings Const. L.Q. 599 (1986) (surveying state supreme court decisions from 1950 to 1980 and finding 311 such instances from forty-five states); *see also* Robert F. Williams, *In the Glare of the Supreme Court*, 72 Notre Dame L. Rev. 1015, 1017 (1997). States have even refused to decide an issue and demanded supplemental briefing on state constitutional law when the parties limited themselves to federal constitutional grounds. *State v. Jewett*, 146 Vt. 221, 222-30, 500 A.2d 233, 234-39 (1985). State constitutionalism allows the states to give independent meaning to their state constitutional protections and to interpret those provisions in unique ways that address the historical concerns of those states.

Many state constitutional provisions are read more expansively than their federal counterparts and are analyzed using distinct methodologies. *See, e.g., Committee to Defend Reprod. Rights v. Myers,* 29 Cal.3d 252, 257-62, 625 P.2d 779, 781-84 (1981) (privacy, due process, and equal protection); *People v. Sporleder,* 666 P.2d 135, 139-42 (Col. 1983) (searches); *State v. Kaluna*, 520 P.2d 51, 58-59 (Haw. 1974) (searches); *Epeldi v. Engelking,* 94 Idaho 390, 393-96, 488 P.2d 860, 863-66 (1971) (separation of church and state); *Richardson v. State,* 717 N.E.2d 32, 48-49 (Ind. 1999) (double jeopardy); *Baldwin v. Reagan,* 715 N.E.2d 332, 337 (Ind. 1999) (searches); *Collins v. Day*, 644 N.E.2d 72, 74-75 (Ind. 1994) (equal protection); *Brady v. State,* 575 N.E.2d 981, 984-89 (Ind. 1991) (confrontation); *Attorney General v. Colleton,* 387 Mass. 790, 795-801, 444 N.E.2d 915, 918-21 (1982) (self-incrimination); *Peterson v. Peterson,* 278 Minn.

275, 277-78, 153 N.W.2d 825, 827-28 (1967) (right to jury); *State v. McGann,* 124 N.H. 101, 104, 467 A.2d 571, 573 (1983) (searches); *State v. Schmid,* 84 N.J. 535, 552-60, 423 A.2d 615, 624-28 (1980) (access to public forums); *Cooper v. Morin,* 49 N.Y.2d. 69, 76-79, 399 N.E.2d 1188, 1192-94 (1979) (due process); *State v. Kennedy,* 295 Or. 260, 270-72, 666 P.2d 1316, 1323-24 (1983) (double jeopardy); *Commonwealth v. Ludwig,* 527 Pa. 472, 474-79, 594 A.2d 281, 282-84 (1991) (confrontation); *Washakie County Sch. Dist. Number One v. Herschler,* 606 P.2d 310, 319, 332-33 (Wyo. 1980) (equal protection in school funding). The presence of distinct state rights combined with the preference for deciding cases on state law grounds, emphasizes the need for express facial presentment. If only a general claim is made, many state courts will look to state constitutional law exclusively. A general claim made in such a state has not raised a federal claim.

A grant of habeas relief on a federal claim that was never explicitly raised before a state's appellate courts and formed no part of the state appellate determinations threatens the state courts' legitimate interest in defining the scope of their review when confronted with claims framed in general language. The grant of habeas relief in such circumstances also threatens the states' compelling interest in interpreting their own constitutions and in not having those decisions essentially rendered impotent by a subsequent federal court. Express, facial denomination of federal claims is necessary if the distinct role of state constitutions is to be preserved.

III. Without a requirement of express facial presentment, state government attorneys will be forced to comb the record and case law for potential federal claims that may exist in order to help protect the vitality of a state court's ultimate disposition.

Oregon correctly notes how its proposed test strikes a proper balance between the interests of state prisoners, state courts, and the federal courts, but the interests of state government attorneys will also served by an express facial

presentment requirement. Such a requirement relieves state appellate attorneys from expending significant resources combing the record for any possible federal issues that, although not actually raised in state court, must be addressed in an attempt to ensure that federal courts will accord the state court judgments the proper respect. Oregon's proposed requirement would also reduce the substantial litigation that occurs in federal habeas courts over the threshold issues of exhaustion and procedural default. In contrast, the Ninth Circuit's "fair opportunity" test places a tremendous and unnecessary burden on the state government attorneys who are entrusted with defending criminal convictions.

Oregon's proposed test does not place additional burdens on an already overburdened corps of state court government attorneys. State government attorneys' interests in assuring that federal courts properly respect state court decisions is at least as great as that of the state courts. Those attorneys must protect convictions through the several layers of appellate and collateral review, including federal habeas corpus review. "Whole record review" and "substance of the claim" tests require state government appellate attorneys to search the record for any possible federal claims that relate to claims actually asserted in the state court briefs. In such circuits, state government attorneys must look beyond the discrete claim presented to the state court and must scour the record for any related federal claims. These tests force state government attorneys to address in state court all potential federal bases for claims. State court judges are then presented with arguments that are superfluous to the actual claim urged by the defendant. State judicial systems are significantly burdened by the consequences of an exhaustion rule that purports to respect comity and state interests but fails to do so. Oregon's proposed test alleviates these consequences and affords genuine respect to the resolution of the case as presented by the parties.

Attorneys who defend state court convictions in federal habeas proceedings expend valuable state and federal

resources litigating exhaustion and fair presentment issues. As Justice Stevens has observed, "Few issues consume as much of the scarce time of federal judges as the question whether a state prisoner has adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus." *Anderson*, 459 U.S. at 8 (Stevens, J., dissenting). So too with state government attorneys. The tests employed by the majority of circuits encourage more litigation than if no exhaustion requirement existed. State prisoners assert every claim that they see fit, regardless of whether they are federal claims or were fairly presented to state courts. These tests require additional litigation to determine whether the federal courts will hear them in the first place.

An express facial presentment test as proposed by Oregon will eliminate much of the inquiry. State prisoners, state government attorneys, and federal courts alike will be able to identify unexhausted claims with ease. Little is served by federal courts going out of their way to identify potential federal claims when the state prisoners did not seek their vindication earlier, and much is gained by simplifying federal habeas procedures. The Court should adopt Oregon's proposed test for fair presentment.

CONCLUSION

The *Amici* states respectfully request the Court adopt Oregon's proposed facial presentation test and reverse the judgment of the Ninth Circuit.

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